84-344

No.

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

DARLENE YOUNGS,

Petitioner,

vs.

BROOME COUNTY DEPARTMENT OF SOCIAL SERVICES,

Respondent,

and

CHARLES and MARGARET PETTIBONE,

Intervenors.

Petition for a Writ of Certiorari to the New York State Court of Appeals

---

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QUESTION PRESENTED.

Whether the rights of a natural parent may be permanently terminated in the absence of a factual showing of unfitness without depriving the parent of due process of law.

PARTIES TO THE PROCEEDINGS.

In the Court below Darlene Youngs, petitioner, had a petition brought against her alleging permanent neglect, by: Broome County Department of Social Services, respondent, and thereafter Charles and Margaret Pettibone intervened in the proceeding.

The real party in interest is the Broome County Department of Social Services.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984.

- X

DARLENE YOUNGS,

Petitioner,

vs.

BROOME COUNTY DEPARTMENT OF SOCIAL SERVICES,

Respondent,

and

CHARLES and MARGARET PETTIBONE,

Intervenors.

- X

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS.

OPINION BELOW.

The opinion of the New York Court of Appeals for which review is sought is reported at page 1c herein. (A copy of the opinion is included in the appendix to the petition.) The Appellate

Division decision is reported and included in the appendix. The trial court issued no written opinion in this case.

JURISDICTION.

The opinion of the New York Court of Appeals, dated June 15th, 1984, was entered in the office of the Clerk of the Family Court of the State of New York, County of Broome, on June 21st, 1984. This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED.

The constitutional provision in this case is Amendment Fourteen to the United States Constitution, Section 1, which reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT.

Petitioner is the natural mother of two children, Tanya Youngs, born February 10, 1977; and Michael Youngs, born March 21, 1978. In late October of 1980, respondent through its caseworkers forceably removed Michael from petitioner's home and on or about December 17, 1980, initiated a permanent neglect proceeding alleging petitioner neglected Michael, that she failed to maintain contact with him, or plan for his future,

notwithstanding their alleged diligent efforts to encourage and strengthen the family relationship. In a decision dated April 8th, 1981, the Honorable Kenneth P. Whiting, Jr. found that respondent clearly proved a case of permanent neglect as defined in Section 614 of the Family Court Act of the State of New York and his opinion included in the appendix to this petition as Appendix A.

In its findings of fact the Family Court noted it was immaterial as to how Michael came into respondent's possession but went on to note that a neglect petition filed by respondent resulted in a stipulation whereby Michael would be placed in respondent's custody for a one-year period and that petitioner was to attend the Broome County Mental Health Clinic for evaluation and treat-

ment if necessary. The Court went on to find that in late 1979 and throughout 1980, petitioner only visited Michael a few times, refused to attend the Mental Health Clinic and found that respondent made diligent efforts to strengthen petitioner's relationship with Michael but that she failed in any way to co-operate or to keep respondent advised of her whereabouts so plans could be made for the return of her child. The Court also found that petitioner had not at any time made any viable plans for Michael's return.

The Court's decision was affirmed by the Supreme Court, Appellate Division, Third Judicial Department which modified the order finding that the Family Court record demonstrated by clear and convinc-ing evidence the criteria enunciated as

binding in neglect proceedings pursuant to this Court's ruling in *Santosky v. Kramer*, 445 U.S. 745 (1982). The decision is reported as *Matter of Michael B*, 88 A.D. 2d 700.

The New York Court of Appeals reversed, holding the evidence in the record was legally insufficient to meet the clear and convincing standard and then remitted the matter for a new hearing. *Matter of Michael B.*, 58 N.Y. 2d 71.

In the new hearing the Hon. Kenneth P. Whiting, Jr. made no factual findings, but found the evidence inadequate and dismissed the petition. Respondent appealed and on appeal the Appellate Division, Third Department reversed the trial court and adjudged Michael to be permanently neglected and granted the petition to terminate petitioner's

rights. A copy of this decision is included as appendix B to this petition. The Appellate Division did not remit for a dispositional hearing but adjudged Michael permanently neglected, transfering custody to respondent and authorizing respondent to consent to Michael's adoption without petitioner's consent.

The Appellate Division made its own findings of fact which disregarded the manner in which respondent secured possession of Michael noting instead that petitioner surrendered him and that during the time respondent had custody, it set up supervised visits with petitioner where caseworkers observed that she handled Michael roughly, was curt and aloof and failed to give him any affection which she clearly gave her daughter, Tanya. The Court went on to find that she failed to keep an appoint-

ment with Michael in December of 1979, and thereafter left Binghamton without notice and was gone from January through October of 1980.

The Court went on to find she went to Texas with a male friend and from there to West Virginia. The Court further found that she returned to Binghamton in October of 1980, and requested visitation.

The Court went on to find that a visit was arranged by what it found as a matter of fact to be petitioner's current caseworker, one Sandra Mantle. The Court went on to find that Mantle told her what she must do to secure the return of her son, namely, to have a psychiatric and psychological evaluation, to find adequate living space, adequate financial resources, to conduct regular and frequent visitation with Michael.

The Court went on to find that petitioner did not secure her own apartment, but moved in with a boyfriend, notwithstanding the factual record indicates directly to the contrary. The Court further found that because of what it characterized as petitioner's "dalliances," her meager work record, and her failure to seek counseling, that Michael was permanently neglected. This decision was affirmed by the New York Court of Appeals on June 7th, 1984. The Court of Appeals found that the evidence comported with the findings of the Appellate Division and that it was clear and convincing. A copy of the Court of Appeals opinion is included as appendix C.

REASONS FOR GRANTING THE WRIT.

On October 29th, 1979, two caseworkers from the Broome County Department of

Social Services came to petitioner's home and forceably removed her then three year old son, Michael from the home. Approximately one week later respondent, Department of Social Services, filed a petition for neglect setting forth various allegations, none of which were supported by any evidence brought to any Court in all of the proceedings held in the case at bar. At the same time respondent brought the proceeding for neglect its caseworkers threatened petitioner and informed her that if she challenged their efforts to take her son, they would also take her daughter Tanya.

Petitioner entered into an agreement giving respondent custody for a one year period in December of 1979 and also consented to go to the Broome County Department of Mental Health for an evaluation in an effort to secure the return of her

son, Michael. After she made this agreement she was informed by one Joyce Brown, a caseworker with the Department, that if she answered any of the questions posed to her at the Department of Mental in an incorrect manner she would lose her daughter Tanya.

Although no factual findings were made demonstrating any neglect or misconduct on petitioner's part, she was permitted only supervised visitation with her son, Michael, in November and December of 1979. She visited Michael several times but finally succumbed to the threats made by the caseworkers concerning her daughter Tanya and left the State of New York because she was afraid they would take Tanya too.

In early January of 1980, petitioner began a journey which took her to the States of Texas, West Virginia and Ohio.

She returned to the County of Broome in October of 1980, for the expressed purpose of being reunited with her son, Michael.

The respondent made no effort to assist petitioner in being reunited with Michael and in fact refused to assign her a caseworker upon her return, and it is respectfully submitted that the Appellate Division's finding to the contrary is flatly refuted by the Record on Appeal. Upon petitioner's return to New York she telephoned respondent and was referred to one Sandra Mantle, who was the supervisor of the Foster Care Unit. It is important to note that Mantle testified that she had no caseload of her own and was responsible for the supervision of some two hundred to two hundred and ten cases in the Foster Care Unit. Mantle flatly refused to assign a caseworker to

assist petitioner in being reunited with her son and instead made plans to permanently terminate petitioner's parental rights.

In keeping with the plan to terminate petitioner's rights, Mantle refused petitioner unsupervised visitation and told her she could see Michael only under the supervision of a caseworker employed by respondent. Mantle repeatedly denied petitioner's request for unsupervised visitation and made absolutely no effort to otherwise strengthen the family ties or assist petitioner with her reunification with Michael.

Indeed, petitioner not only was given no assistance but placed in the catch-22 position of being told she would have to secure more adequate living quarters at the same time her court-appointed attorney was telling her that

if she moved again it would be evidence of, in her words, "unstabilization." The Appellate Division found as a matter of fact the "instruction" that petitioner secure additional living quarters was simply a part of the agency's diligent effort to reunite her with her son, Michael. This finding was as incredible as its finding that Sandra Mantle was petitioner's current caseworker and that Mantle hurriedly arranged a visit to accommodate petitioner's "brief stay in Binghamton." In fact, Mantle did not hurriedly arrange any kind of visit, but rather informed petitioner she had no right to see her son without supervision and had already made a decision that they were going to bring a permanent neglect proceeding and that while this was being pursued she would be given only supervised visitation with Michael.

Petitioner respectfully submits that the case at bar is a classic example of, and, indeed, a testimonial to, the ability of the State to shape the historical events that provide the basis for the ultimate termination. Indeed, in late 1979, the few supervised visits that petitioner had with her son resulted in the Appellate Division finding that during these visits the caseworkers observed her to be curt, aloof, and that she handled Michael roughly, failing to give him any of the affection she clearly gave to her daughter. It should not be surprising then upon her return to New York she was wary of having visitation in the presence of a supervisor employed by the respondent.

In any event there is simply no question that up to October of 1980, when petitioner returned to New York, there

was no factual basis to conclude that she was unfit as a mother. Even if one accepts respondent's position that she abandoned her child for a period of some ten months for whatever reason, the actions she demonstrated upon her return to New York in October of 1980, clearly and undisputably demonstrate that she acted in accordance with her own limited abilities to do everything she could to secure the return of her son, Michael. At every point respondent placed obstacle upon obstacle in front of her, ranging from telling her the apartment she secured was on "prostitute street" and she would have to move, to outright refusal to assign her a caseworker to work with her in accordance with the respondent's duty to reunite her and her son, Michael. Despite these obstacles petitioner did in fact secure an apartment, she did in

fact purchase blankets and clothing for Michael; she did in fact, secure employment, and did in fact do everthing that respondent was requiring of her to secure the return of her son, Michael.

In *Santosky*, this Court observed that the Due Process Clause would be offended if the State attempted to force the break-up of a natural parent over the objections of the parents without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest. The record in the case at bar will simply not support any finding that petitioner was not a fit mother. If anything, this case breathes real life into this Court's concludion in *Santosky*, that the State's ability to assemble its case almost inevitably dwarfed the parents' ability to mount a defense. Indeed, here respondent

not only vigorously employed the vast array of resources available to it, but secured initial possession of the child by forceably removing Michael from petitioner's home. This misconduct was compounded by threatening to take petitioner's other child, thus causing her to flee the State for fear of losing both her children.

It is only necessary to point out that the first time the New York Court of Appeals reviewed this case Judge Cook noted that proceedings to terminate parental rights turn almost entirely on assessments of the credibility and character of witnesses and particularly on the assessment of the character and temperament of the parent, and that the finding of the *Nisi Prius* Court must be accorded the greatest respect. Indeed he went on to state that the warmth and complexity of

such relationships should not be assessed against the typed words of a cold record. *Matter of Michael B*, 58 N.Y. 2d 71, concurring. Yet that is precisely what happened in the case at bar.

The trial court dismissed the petition after hearing all of the proof finding that there was inadequate evidence to show that petitioner was an unfit mother. Petitioner respectfully submits that if the instant decision is permitted to stand it can only result in the erosion of the constitutional principles which have historically and consistently prevented the State from intruding into this most fundamental area.

Counsel is mindful of the functions of this Court and that it does not ordinarily review evidence or discuss specific facts. Nonetheless, in the case at bar,

the bottom line is that it was simply wrongly decided and it would be a gross miscarriage of justice to permit the permanent termination of petitioner's parental rights on these facts. Indeed, one might correctly note that the Courts below did not accurately apply the standard set forth by this Court in *Santosky* and if the instant decision stands, may well lead, at least in the New York Courts, to the subtle erosion of the substantive standard mandated by this Court's decision in *Santosky*.

CONCLUSION.

For these reasons, a Writ of Certiorari should issue to review the judgment of the New York State Court of Appeals.

Respectfully submitted,

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APPENDIX A.

DECISION OF THE BROOME COUNTY FAMILY COURT.

STATE OF NEW YORK

BROOME COUNTY : FAMILY COURT

DOCKET NO. B 9 80

In the Matter of the Commitment of Guardianship and Custody pursuant to S384-b of the Social Services Law of

MICHAEL YOUNGS

A Child under the Age of Eighteen years alleged to be a Permanently neglected Child

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On December 17, 1980, the Department of Social Services of Broome County filed a petition with this Court alleging that one Michael Youngs was a permanently neglected child.

From the evidence it appears that Michael Youngs, born March 21, 1978, has been in the care of the Broome County Department of Social Services since on

or about October 29, 1979. There is some dispute as to exactly how the boy came into foster care on that date, but it is immaterial in the determination of this matter.

On October 7, 1979, a neglect petition was filed with the Court, and Michael was placed with the Department of Social Services on that date by Court order. Thereafter, on December 14, 1979, the Court order was entered suspending judgment on the neglect petition and custody of Michael was placed with the Department of Social Services for a period of one year; pursuant to stipulation the mother of the child was ordered to attend the Broome County Mental Health Clinic for evaluation and treatment if necessary.

During November and December of 1979, the mother visited Michael in the foster home on two or three occasions but failed

to keep a scheduled visitation on Christmas Day of 1979 indicating that her car had broken down.

No further visits were had and sometime during January of 1980 the mother departed the Broome County area without notice to the Social Services Department and traveled to Texas and failed to report to the Social Services Department her whereabouts; she took with her her daughter, Tonya, who was approximately three years old at that time, but she left Michael in Broome County.

There is little dispute about the facts of what occurred following the mother's leaving Broome County. After spending approximately three or four months in Texas she then spent three or four months in West Virginia, and then three or four months in Ohio. During that time she had no communication with

the foster mother concerning the child and failed to remember him in any way on his birthday or other holidays.

Her only contact with the Broome County Department of Social Services were telephone calls on April 23, 1980, May 23, 1980, September 18, 1980, and October 21, 1980, when she advised the caseworker that she had returned to Broome County.

Her next visits with Michael took place on October 22, 1980, October 31, 1980, and December 17, 1980.

The mother has refused to attend the Mental Health Clinic as ordered by the Court although appointments were made for her on two separate occasions.

The Court is satisfied that the Broome County Department of Social Services has made diligent efforts to encourage and strengthen the parental relationship with the mother, but she has failed

in any way to cooperate and has in fact failed to keep the Department advised of her whereabouts so that plans could be made for the return of the child. The Court is further satisfied that the mother has not at any time since the child was placed in foster care made any viable plan for the return of the child.

Although the mother professes to love the boy by her actions she has shown the Court to the contrary. The child has been in the custody of the Broome County Department of Social Services for approximately 17 months and was in the custody of the state of Maryland Social Services Department for a period of eight months so that of his three years of life he has been in foster care for approximately 25 months of that time.

This Court is satisfied this is clearly a case of permanent neglect as defined in Section 614 of the Family Court Act.

DATED: April 8, 1981

Kenneth P. Whiting, Jr.
J.F.C.

CC: Spero Pines, Esq.
Thomas Oakes, Esq.
Peter VanZandt, Esq.

APPENDIX B.

DECISION OF APPELLATE DIVISION, THIRD DEPARTMENT.

3 In the Matter of MICHAEL B., a Child Alleged to be Permanently Neglected. BROOME COUNTY DEPARTMENT OF SOCIAL SERVICES, Appellant; DARLENE B., Respondent; CHARLES FF. et al., Intervenors-Appellants. — Appeal from an order of the Family Court of Broome County (Whiting, Jr., J.), entered March 14, 1983, which dismissed the petition seeking an adjudication of permanent neglect pursuant to article 6 of the Family Court Act. A permanent neglect proceeding was initially brought by petitioner Broome County Department of Social Services against respondent regarding her son on December 17, 1980. The petition alleged that petitioner had made diligent efforts to encourage and strengthen the family relationship; that respondent failed for a period of one year following the date petitioner gained custody to substantially and continually or repeatedly to maintain contact with or plan for the future of the child; and that the best interests of the child required guardianship and custody to be with petitioner. The Family Court granted the petition. On appeal (*Matter of Michael B.*, 88 AD2d 700), this court modified Family Court's order which had granted the petition upon a fair preponderance of the evidence. It was held that the Family Court record supported a grant of the petition by clear and convincing evidence, the criteria enunciated as binding in neglect proceedings in the Supreme Court's ruling in *Santosky v Kramer* (455 US 745), and that a new hearing *de novo* was not necessary. The Court of Appeals (*Matter of Michael B.*, 58 NY2d 71) reversed and held that the evidence in the record was legally insufficient to meet the clear and convincing standard and remitted the matter for a new hearing. The court said that a new hearing was mandated in that the evidence failed to establish that the mother did not maintain contact with or plan for the future of the child under the *Santosky* criteria. The new hearing consisted of inclusion in the record of the March, 1981 proceedings by stipulation and additional testimony. The record indicates that the child came to petitioner's foster care on October 29, 1979 when respondent surrendered him. Petitioner set up supervised visits with respondent and her son and it was observed that her treatment of the child was curt and aloof. She handled him roughly and failed to demonstrate any of the affection she clearly gave her daughter. Respondent made three visits with him but failed to keep an appointment to visit her child in December of 1979. Thereafter, she left Binghamton without notice and was gone from January to October of 1980. Respondent went to Texas with a male friend, who was 18 years of age, and with other members of his family. She lived there for three months. While there, she cohabited with her boyfriend. The two of them, and her daughter; shared the same sleeping quarters. Petitioner sent a letter to respondent in care of her parents' home and was notified by the family of her

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whereabouts. Petitioner then wrote to her in Texas and advised her of her responsibilities to visit her child and to plan for his future. In response, respondent called petitioner and informed the department that she was now in West Virginia and that she would like to get her son back. Petitioner requested an investigation from West Virginia social services authorities to see what conditions prevailed where respondent lived. However, she had moved again. Respondent's mother once again informed petitioner of her daughter's new address. On August 7, 1980, petitioner wrote to respondent at her new address and indicated what her responsibilities were to her child. She was also advised, to allay fears she had expressed, that the evaluation of her ordered by Family Court at a mental health clinic was not intended to commit her to any psychiatric center but was sought merely as an evaluative tool to determine what assistance she needed before her son could be returned to her. The letter was returned as undeliverable. Respondent's caseworker spoke with respondent by phone on September 18, 1980 and was advised that she was living in Ohio. Petitioner then called the social services agency in Ohio and followed with a letter on September 24, 1980, asking for an evaluation of respondent's current situation. The caseworker sent another letter on October 22, 1980 to the Ohio Department of Social Services indicating with whom contact was to be made in her absence due to maternity leave. On October 21, 1980, respondent left a phone message with petitioner indicating that she was in town and asking that she be allowed to visit her son. A visit was hurriedly arranged to accommodate her brief stay in Binghamton. Respondent indicated when she came for the visit that she would remain in Binghamton. She was advised again by her current caseworker, Sandra Mantle, what she needed to do to have her son returned to her. She was instructed that she must comply with the court order for a psychiatric and psychological evaluation, find adequate living space, adequate financial resources, i.e., a job or public assistance, and finally, conduct regular and frequent visitation with the child. Respondent visited the child on October 31, 1980. On November 3, she consented by phone to the mental health evaluation but she failed to call back as directed for the scheduled date. A notice was sent to respondent for a November 18, 1980 appointment which she failed to keep. She claimed the notice was misdirected and that she did not get it on time. Respondent was seen again on December 1 by her caseworker and reported that she was applying for public assistance, since she was unable to work due to mononucleosis, and that she wanted her mother to have the child because she would be on her back for six months. Respondent requested a three-day visit with her son for the Christmas holidays. Mrs. Mantle advised her that a permanent neglect proceeding was being instituted and that she would be granted a supervised visit with her child. Respondent failed to follow through on the Christmas visit. Respondent testified at the initial hearing that she did not voluntarily surrender her son and that she left Binghamton because she feared petitioner would take her daughter as well. She went to Texas and remained there for three months with her present fiancé and then went to West Virginia and Ohio. Although West

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Virginia authorities gave her money to return to New York to see her son, she used the money instead to go to Ohio. In Ohio, she lived with a man and became pregnant, but lost the child. Respondent claimed that she amassed some $600 of money and returned to New York to set up an appropriate home for her son. She claimed that she did not go to the psychiatric clinic because the notice from petitioner was misdirected. She also testified that she presently shared an apartment with her fiancé. She claimed that when she returned to Binghamton, she lived with her parents and then moved to 213 Chenango Street. She set up an apartment there and was joined by her fiancé. At the 1983 hearing, her fiancé testified, contrary to her testimony, that respondent did not establish any apartment for herself on her return to Binghamton but rather moved in with him at his mother's apartment. The fiancé testified that he found a job as a caretaker and was given a one-room apartment for one-half rent as payment for his work and that it was he who paid for the apartment in which the two of them reside, together with respondent's daughter. He disclosed that, contrary to respondent's testimony, he lived with her in Texas for three or four months. He also indicated that respondent received timely notice of the psychiatric evaluation appointment but declined to attend. He testified that respondent worked only briefly and that her illness which she characterized as mononucleosis indisposed her for only two days. A friend of respondent testified that on respondent's return to Binghamton, she lived with her briefly. Respondent told her that she had lived with a man in West Virginia. The witness indicated that she knew that respondent had two brief alliances with other men after her return to Binghamton and that, on one occasion, she left her daughter with the witness and remained out overnight with a man she had just met. Evidence also disclosed that after respondent's return to Binghamton, although she was not far removed from her son's foster home, her visits to him were sporadic and brief. At the end of the second hearing, Family Court made no factual findings concerning the allegations of permanent neglect but found the evidence inadequate and dismissed the petition. The Court of Appeals indicated that the new hearing was to be held to allow petitioner an opportunity to address the requirement of more stringent proof enunciated in *Santosky* (*supra*). On this record, we find that petitioner has met that burden. It is obvious that despite respondent's failure to advise the department of her whereabouts, petitioner, by its own diligent efforts, located her and made attempts to re-establish the relationship between respondent and her son. We find, too, that respondent failed substantially and continuously to plan for the future of her child. Though her sporadic visits and phone calls to petitioner indicated a wish to reclaim her son, she failed to take steps to set up an adequate home for him and to make any realistic plans to regain custody. Her testimony as to having saved money to set up an apartment for her child was totally discredited by her subsequent actions of moving in with a friend, then into her boyfriend's mother's home, and finally into a one-bedroom apartment with the boyfriend and her daughter. Her dalliances, meager work record, exaggerations as to her illness and failure to seek counseling all indicate by

clear and convincing evidence that her child is permanently neglected (*Matter of Kimberly Marie DD.*, 93 AD2d 919). Respondent has failed to accept the parental role. Her unwillingness to substantially plan for her child's future in any meaningful way supports such a finding. It is settled that a finding of either a failure to maintain contact or a failure to plan for the child's future is sufficient to support a finding that the child is permanently neglected (*Matter of Orlando F.*, 40 NY2d 103; *Matter of Melanie Ruth JJ*, 76 AD2d 1008). Order reversed, on the law and the facts, without costs; petition granted, Michael B. is adjudged permanently neglected, and custody is transferred to the Broome County Department of Social Services, which is authorized to consent to the adoption of the child subject to the order of a court of competent jurisdiction. Kane, J. P., Main, Mikoll, Yesawich, Jr., and Levine, JJ., concur.

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APPENDIX C.

OPINION OF THE COURT OF APPEALS.

STATE OF NEW YORK

COURT OF APPEALS

3 No. 253

In the Matter of Michael "B"
Alleged to be a Permanently
Neglected Child.

Broome County Department of
Social Services,

Respondent,

Darlene "B",

Appellant,

Charles "FF" et al.,

Intervenors-Respondents.

Ronald R. Benjamin, Binghamton, for appellant.

Thomas B. Oakes, Binghamton, for respondent Broome County Dept. Social Services.

Peter E. J. Nilsson, Honeoye Falls, for intervenor-respondent.

G. Peter VanZandt, Binghamton, law guardian.

The order of the Appellate Division should be affirmed, without costs.

On our prior consideration of this matter we remitted for a further hearing because the record indicated that appellant had made several visits to her son, procured living accommodations and financial means for her son, and that she had failed to undergo psychological testing because of a misdelivery of the notice of appointment.

After the further hearing the Trial Judge concluded that the additional evidence introduced did not change the situation and that he was bound by our prior decision. In light of the additional testimony presented, the Appellate

Division, however, found appellant's testimony as to setting up an apartment for her son was totally discredited, that she had visited Michael but sporadically and had intentionally declined to seek counseling, and that her meager work record was not excused by her claimed illness, which it found exaggerated. It, therefore, adjudged Michael to be permanently neglected and granted the petition to terminate her parental rights. On review of the record, we find that the weight of the evidence comports with the findings of the Appellate Division and is clear and convincing.

* * * * * * *

Order affirmed, without costs, in a memorandum. Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Meyer, Simons and Kaye concur.

Decided June 5, 1984

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No. 84-344

IN THE

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October Term, 1984

DARLENE YOUNGS,

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vs.

BROOME COUNTY DEPARTMENT OF SOCIAL SERVICES,

Respondent,

and

CHARLES and MARGARET PETTIBONE,

Intervenors.

Brief in Opposition to Petition for a Writ of Certiorari to the New York State Court of Appeals

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(THOMAS B. OAKES on the brief
Admitted to practice in
Court of Appeals, highest
New York State court.)

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QUESTION PRESENTED

In a proceeding in which the natural parent's unfitness was proved by clear and convincing evidence, in which her parental rights were permanently terminated, and in which the parent did not raise her alleged issue of due process in the state rehearing and appellate courts: whether the termination of her rights would deprive her of due process, and whether the petition presents a special or important reason, an important question of federal law, calling for this Court's exercise of a review on writ of certiorari or in fact seeks only further review of weight of evidence.

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STATEMENT OF THE CASE

The New York State Court of Appeals determined that the weight of the evidence comported with the findings of the Appellate Division and was clear and convincing that the petitioner (Michael Youngs' mother) had permanently neglected Michael and that the petitioner's parental rights to Michael should be terminated.

The appeals to the Appellate Division and to the Court of Appeals followed a rehearing by Family Court of the respondent's permanent neglect petition, after the Court of Appeals had returned the case to Family Court for rehearing in which the respondent would have the opportunity to present evidence with the awareness of the clear and convincing proof standard of Santosky v.

Kramer, 455 U.S. 745(1982), (decided after the initial Family Court determination).

At the rehearing and in the appeals before the Appellate Division and the Court of Appeals from the Family Court decision in the rehearing, the petitioner did not raise the alleged federal question sought to be reviewed. The petitioner's arguments below were evidentiary. She did not raise the alleged issue that she was deprived of due process because of alleged absence of factual showing of unfitness.

After the rehearing was held, the Appellate Division of the New York Supreme Court, with the authority to determine the case on the facts, reversed the Family Court's decision (made with no findings of fact) after the rehear-

ing, and found, based on evidence, that the proof was clear and convincing:

> "It is obvious that despite respondent's failure to advise the department of her whereabouts, petitioner, by its own diligent efforts, located her and made attempts to re-establish the relationship between respondent and her son. We find, too, that respondent failed substantially and continuously to plan for the future of her child. Though her sporadic visits and phone calls to petitioner indicated a wish to reclaim her son, she failed to take steps to set up an adequate home for him and to make any realistic plans to regain custody. Her testimony as to having saved money to set up an apartment for her child was totally discredited by her subsequent actions of moving in with a friend, then into her boyfriend's mother's home, and finally into a one-bedroom apartment with the boyfriend and her daughter. Her dalliances, meager work record, exaggerations as to her illness and failure to seek counseling all indicate by clear and convincing evidence that her child is permanently neglected (Matter of Kimberly Marie DD., 93 AD 2d 919). Respondent has failed to accept the parental role. Her unwillingness to substantially plan for her child's future in any meaningful way supports such a finding."
>
> Matter of Michael B., 96 AD2d 961 (1983).

That opinion of the Appellate Division(as set forth at page 1b of Appendix B of the petition for a writ) accurately sets forth the clear and convincing proof of the chronology of the petitioner's nine-month out-of-state desertion of her son from January 1980 until October 1980 as she trailed several men among three states, and the periods before and after that in which she stayed away from her son and did not visit him even though she lived within a bus ride and, later, a short walk of the foster home where he lived. That opinion also accurately set forth the clear and convincing proof of the respondent's diligent searches for the petitioner as well as diligent efforts to help her throughout the thirteen months of foster care from October 1979 until December 1980.

The Appellate Division recognized that at the rehearing the respondent produced several new witnesses, who testified to new information and whose testimony contradicted the petitioner's testimony in several important areas.

The petitioner did not take the stand to testify in the rehearing, nor did she offer any other evidence than the transcript of her testimony from the first hearing. She offered nothing new to counter the respondent's new evidence.

The respondent's new evidence included a person with whom the petitioner had stayed, the man with whom petitioner left for Texas and with whom she was staying when the permanent neglect proceeding began in December 1980, and the landlord's agent of the building where

the petitioner stayed after she returned from her nine-month absence. New evidence showed, among other things:

That the petitioner left for Texas because she was in love with her boyfriend, with whom she left; not out of any fear;

That when the petitioner was not staying with her own mother, Michael's grandmother, the petitioner did not visit Michael. The only exception was a visit when the grandmother was the one who picked Michael up and returned him. (There were only five visits in thirteen months, as previously proved);

That when she was moving in or staying with friends before and after her nine-month absence from New York State, she did not visit Michael even though she was staying either within a walk or a short bus ride from his foster home,

That the petitioner had testified inaccurately when she said she had used $600 savings to rent an apartment, allegedly establishing a home for Michael, when she returned to Binghamton; she having instead been shown not to have been a rent-paying tenant before the permanent neglect petition was filed;

That in Texas she did live and sleep with her boyfriend three months (with her young daughter sleeping in the same enclosure), contrary to her testimony in the first hearing;

That after Texas, she lived with another man in West Virginia, also contrary to her testimony,

That in November 1980 she did not once ask to visit Michael,

That after her return to Binghamton, New York, she persisted in her determination not to have a psychiatric evaluation, and she made no effort to keep her job.

The Court of Appeals determined that the evidence comported with the Appellate Division's findings and was clear and convincing.

ARGUMENT AGAINST THE ALLOWANCE OF THE WRIT OF CERTIORARI.

1. A writ of certiorari should not be allowed, because the petition for a writ of certiorari does not present a question of federal law. United States Supreme Court Rule 17.1. It seeks in fact only a review to weigh the evidence. This is the effect of the petition's argument at page 20 that the case allegedly "was simply wrongly decided." The respondent submits that this presents no federal question. The respondent submits that the permanent neglect of the child was so clearly and convincingly proved as to present a compelling case, so that the case emphatically was rightly decided; but that the factual issue of the weighing of the evidence does not

present a federal question for this Court's review. Unites States Supreme Court Rule 17.1.

The care which the state court system exercised to correctly apply the "clear and convincing evidence" standard of Santosky v. Kramer, 455 U.S. 745(1982) in this case is shown in its having been returned by the Court of Appeals for a rehearing under that standard, Matter of Michael B., 58 NY 2d 71, and after rehearing and dismissal by the Family Court, being reviewed as to the evidence by both the Appellate Division and the Court of Appeals, both of which benches unanimously found the petitioner's permanent neglect to have been clear and convincingly proved as set forth in the comprehensive findings of fact in the Appellate Division's opinion, which is

set forth in full as Appendix B of the petition for writ of certiorari.

This lack of merit to the petitioner's allegation that there is a federal question is reflected in the petitioner's failure to have raised or preserved the alleged federal question in the state courts.

2. A writ of certiorari should not be allowed, because the petitioner did not raise the alleged federal question sought to be reviewed in any of the state courts, in the rehearing or in the appeals from the rehearing, and the petition for a writ of certiorari does not state that the alleged federal question sought to be reviewed was so raised. U.S. Supreme Court Rule 21.1(h). The petitioner rightly did not see fit

to bring forward such an assertion below, and it has no more merit now when it is pushed forward only as another form of the petitioner's argument about the weight of the evidence.

3. The facts of this case overwhelmingly called for a finding of permanent neglect, terminating the petitioner's parental rights, and freeing this child for the opportunity for adoption.

The petition for a writ begins its statement incorrectly on its page 3 by alleging that the duration of foster care had been from October 1980 to December 1980, when the permanent neglect proceeding was commenced. The foster care was from October 1979 until December 1980, a period of over thirteen months, not just two months. This

appears from the Appellate Division decision, Appendix B of the petition for a writ. During nine of those thirteen months, the petitioner was away from New York State, ignoring her son and living and traveling among three different states with several different men. When she was in Broome County, New York, near her son's foster home before and after her nine-month desertion she displayed the same choice, preferring her pleasure-seeking, promiscuous drifting life, to the exclusion of her son and to the exclusion of any planning concerning him. The Appellate Division well said that the petitioner "has failed to accept the parental role." (page 4b of the petition for a writ)

It was the petitioner who on October 29, 1979, telephoned the respondent to come and get her child. No force was used in placing the child in care, as was shown by the testimony of two caseworkers. In fact, their testimony showed the contrast between the petitioner's communication and contact with her daughter and her lack of communication and contact with her son on that October 29. At that time, legal custody of her children resided in Maryland social services department by Maryland Court Order under which placement of the children with the petitioner was under the respondent's protective supervision. On November 7, 1979, the respondent filed a child neglect petition with Broome County Family Court and received from that Court a

temporary order of custody of the son. The petitioner and her attorney appeared in Family Court on November 19, 1979, in that proceeding; and on December 17, 1979, an order based upon their stipulation continued custody for a year from that December 17. No appeal was made from any part of the foregoing proceedings which culminated in the stipulated custody order.

After the petitioner failed to keep her scheduled Christmas 1979 visit with the child, the petitioner disappeared. At the rehearing one of the persons with whom the petitioner then had stayed, was asked if the petitioner said why she was going to Texas, and testified that the petitioner said she was going with Paul (her boyfriend) and they were in love.

The petitioner did not take the stand to deny this. The respondent's caseworker (Joyce Brown) testified that she had not talked with the petitioner about the psychiatric evaluation nor about custody of the daughter. The evidence that the petitioner deserted her son to go with her boyfriend was also consistent with the petitioner's conduct from that time on: the petitioner chose to live with her current boyfriends to the exclusion of any involvement with her son. The Appellate Division's opinion's recitation of the petitioner's continued moves, taking up with various men, as the respondent continued to try to find her again and work with her is fully born out by the proof. After locating her, the respond-

ent also tried to work with her through social services departments in the other states. There were no threats.

In the entire thirteen months, the petitioner visited her son only five times. The first three visits were in the first two months of custody and while the petitioner was still staying with Michael's grandmother. The last two visits were both in the last ten days of October 1980, immediately after her re-appearance in New York State. On October 21 the petitioner told the respondent that she was just visiting in New York and would leave in a day. From the evidence it appears that she was staying with Michael's grandmother. The grandmother herself was the one who picked up and returned Michael on that

Halloween. Thereafter in the entire month of November 1980 she never asked to visit Michael, despite the respondent's urging that frequent and regular visits were necessary. When the petitioner was out of her own mother's (Michael's grandmother) oversight, the petitioner made no moves whatever toward her son. She showed no interest of her own. She admitted in the first hearing that a West Virginia social services department gave her bus fare home so that she could see Michael but that instead she rode to Ohio with yet another man. While she was in Texas she received money for a birthday card for Michael, but spent the money on other things and did not send the card. She lived with different men in Texas,

West Virginia, and Ohio. In Ohio she became pregnant by a man other than the one with whom she went to Ohio. Throughout her travels, respondent tried to find where she was, then wrote to her, and communicated with the local social services department where she was.

The evidence contradicts any claim that petitioner's return to Broome County in October 1980 was to be with Michael. When she arrived, she said that it was for a couple of days and that she would go right back to Ohio. At the rehearing her boyfriend testified, revealing that she had by chance seen him at a store and thereafter moved in to stay with him, at first in his mother's apartment, where he was then staying. The petitioner did not take the stand to contradict his testimony. Just as she had de-

serted Michael in order to be with her boyfriend in January 1980, she over nine months later decided to remain back in Broome County because of her boyfriend. This did not mean that she would try to see Michael, who lived only a mile away, though. She did not try to see Michael for an entire month after Halloween.

When the petitioner was heard from on October 21, 1980, with only a day or two in which to visit Michael before leaving again, the respondent did cooperate in an immediate visit for October 22. The respondent's caseworker was just then about to begin maternity leave. When the petitioner appeared again on October 27, it was a surprise that she was still in town, and the caseworker's supervisor, who had been reviewing the

case with the caseworker over the past year, met with the petitioner. This enabled the respondent to respond promptly with the petitioner.

The supervisor gave the petitioner lengthy counsel which can only be seen as helpful and compassionate. The supervisor explained that the psychiatric evaluation (to which the mother had stipulated and which she admittedly had deliberately missed over nine months before) was necessary and was to see whether there was a need for therapy and that any therapy, if needed, would be to resolve any problem and work toward having the child back; that the petitioner should have adequate living space and adequate finances (whether a job or public assistance); and that the petitioner must have regular and frequent visitation with the child.

On November 3, 1980, the supervisor offered transportation to the evaluation and asked the petitioner to arrange an appointment with the mental health clinic and call the supervisor back in three days. The petitioner went through that November without asking for a visit. She continued in her determination not to go for an evaluation and did not telephone the supervisor until November 19, the day after the appointment for the evaluation. She decided to stop working, after an illness of only a couple of days; and she continued her informal staying on with her boyfriend in various lodgings in the building he lived in. Contrary to the petitioner's testimony at the first hearing, the landlord's agent testified at the rehearing that the petitioner did not pay rent in 1980. The petitioner

did not testify in the rehearing to contradict this.

There is no evidence that the petitioner requested that a caseworker be assigned in the supervisor's place, nor that any such request was refused. The supervisor had stepped in to help when the petitioner appeared without notice, and became involved in counseling the petitioner in the two months after the petitioner's return.

As to page 13 of the petition for a writ, the supervisor counselled the petitioner to have regular and frequent visits with the child on October 27, 1980, when the petitioner first said she would stay in Broome County. Except for the one Halloween visit where the child's grandmother picked him up, the petitioner

never sought a visit until over a month later, December 1, 1980, and then only for three weeks away. On December 2, 1980, the respondent advised the petitioner that a permanent neglect petition would be filed and that visits would be supervised.

On page 13 the petitioner admits that the petitioner chose not to heed the respondent's advice about adequate housing. She does not claim the respondent gave her conflicting advice, only that she and her counsel chose not to heed it. It is noted that an objection to her testimony about her attorney's advice was sustained and the petitioner has not questioned that ruling on appeal.

Page 14 of the petition for a writ misstates the proof concerning visitation and the petitioner's return in October 1980. The Appellate Division correctly found that a visit was hurriedly arranged to accommodate the petitioner's brief visit in Binghamton. The Appellate Division opinion does not say that Ms. Mantle was the person who arranged that visit. Ms. Mantle did, however, step in to fulfill the caseworker role for the petitioner upon the petitioner's surprise visit of October 27, 1980. The petitioner's descriptions of what Ms. Mantle told the petitioner about visitation and about a decision about a permanent neglect proceeding contradict the record. Respondent's brief has already described Ms. Mantle's counsel to the petitioner that she should have frequent and regular visitation. The discussions about supervised visitation

and permanent neglect were not in October 1980. They were in December 1980 after the petitioner had continued her drifting, pleasure-seeking life, and her determination not to cooperate about an evaluation throughout the month of November, with no request to visit the child who lived only a mile away from her.

The petition's page 15 refers to the Appellate Division's findings that the petitioner was observed at visits to be rough and aloof toward her son, and to fail to give him the affection she showed her daughter. These findings were supported by the proof. She should only have been wary of observation of the visits, if she expected not to improve.

All of the foregoing proof presents clear and convincing evidence of the peti-

tioner's unfitness as the mother of this child. The respondent's efforts were diligent in searching for the petitioner and trying to help her, throughout thirteen months. She excluded the idea of being her son's parent from her life, and chose another kind of life.

The New York Court of Appeals took great care to assure the application of the Santosky standard of proof. After the Family Court judge who had earlier held that there was "clearly" permanent neglect in the first hearing apparently and mistakenly felt foreclosed by the Court of Appeals from considering the case as a whole despite the extensive, clear and convincing proof in the rehearing, the Appellate Division and Court of Appeals

both thoroughly reviewed the evidence and correctly found, as the findings of the Appellate Division set forth, clear and convincing proof of permanent neglect.

No reason, much less special or important reason, exists for this Court to be asked to conduct an evidentiary review of this proceeding in which the state courts have arrived at a correct decision on compelling evidence after thorough and careful application of the Santosky standard of proof. United States Supreme Court Rule 17.

The petitioner, who was discredited and contradicted by witnesses that she herself knew and could have produced in the first hearing or the rehearing, neither contested respondent's new witnesses nor

raised any constitutional questions as to weight of the evidence at rehearing or appeal. The respondent submits that the case has been rightly decided by the Court of Appeals based upon thorough consideration of the overwhelming evidence presented by the respondent.

CONCLUSION

For these reasons, a Writ of Certiorari should not issue to review the judgment of the New York State Court of Appeals.

Respectfully submitted,

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